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No. 874

October Term, 1958

IN THE

Supreme Court of the United States

BENNIE L. WHITFIELD, ET AL., *Petitioners*,

versus

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 2708, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals Fifth Circuit

DENT, KING, WALKER & WICKLIFF
ROBERSON T. KING
[illegible] Avenue
Houston 2, Texas
Attorneys for Appellants

[illegible] Law Brief Co., [illegible] Boston 2

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No._____

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versus
UNITED STEELWORKERS OF AMERICA,
LOCAL NO. 2708, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
Fifth Circuit

Petitioners *Bennie L. Whitfield, Douglas H. Fairbanks, Willie Yancy, Jr., George Curtis* and *Janies P. Mills,* pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on July 18, 1958.

I.

CITATIONS TO OPINIONS BELOW

The Judgment of the United States District Court for the Southern District of Texas is reported at 156 F. Supp.

43 and is printed in the accompanying record certified by the Clerk of the United States Court of Appeals, Fifth Circuit (R. 665, 692). The opinion of the Circuit Court of Appeals is in the Certified copy of the record, p. 701, and is reported in 263 F. 2d 546.

II.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 30, 1959 (R. 714). Rehearing was denied on February 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

III.

QUESTIONS PRESENTED

Whether the duty not to discriminate or impose upon the Defendant labor union was discharged by negotiating a contract which did not equalize the employment status of Negro employees with white employees with comparable seniority standing.

Whether a collective bargaining contract entered into between Defendant union and Defendant Company, which attempted to remove racial delimitation on promotional opportunities, is nevertheless discriminatory where it incorporates into its provisions a penalty as a prerequisite for non-discriminatory promoting.

Whether the exclusive bargaining representative of a class of employees may be enjoined from enforcing a collective contract which preserves intact the employment status of White employees but incorporates, with respect to the Negro employees, much of the old practice of racial discrimination in promotional opportunities.

IV.

STATUTES INVOLVED

The statutory provisions involved are: The National Labor Relations Act, as amended, 29 U.S.C. 151, et seq., and 28 U.S.C. 1331. These provisions are printed in Appendix A.

V.

STATEMENT

Five Negro employees of the Sheffield Division of the Armco Steel Corporation, Petitioners herein, filed their suit in the United States District Court for the Southern District of Texas, asking for declaratory and injunctive relief and also for damages, the said cause of action alleged to have arisen out of a racially discriminatory contract entered into between Sheffield and Local 2708, United Steelworkers of America. The Petitioners alleged in substance in their complaint that the contract (R. 11-12), the application of which is sought to be enjoined, discriminated against them solely on the basis of their race. They alleged and proved that the contract in question, which was the result of sometime negotiations between White and Negro employees on the one hand with the company on the other hand, was entered into for the purpose of eliminating the racially discriminatory promotion practices that had existed at Sheffield therefore (R. 9). The evidence established, that at Sheffield there were within various Departments what had come to be called lines of progression which jobs were classified and numbered (R. 98, 99).

In most Departments there are two lines of progression and prior to the agreement herein complained of, these lines of progression were designated as line one (1), the

line composed of White employees, and line two (2), the line composed of Negro employees. In line two the jobs progressed in classification from the non-skilled to the semi-skilled. In line one the jobs progressed in classification from the semi-skilled to the skilled.

Evidence tended to show that Petitioners and those whom they represented urged the company to change this system so as to allow Negro employees the opportunity to promote into the higher paying more skilled jobs (R. 100, 119-122). Subsequent to these importunities a seniority study committee was appointed and after negotiation with the company, and after the company made the proposal, the contract on May 31st was agreed upon by all members of this special negotiating committee except the Negro members who maintained that it offered no advantage to Negro employees. Instead they argued that it carried with it a penalty which stifled the incentive to promote by requiring, as a condition to moving from line two to line one, that the person so promoting take the bottom job in that line without regard to what job be held in line two. This, they objected, would result in numerous cases, in men demoting themselves, taking less pay, rather than increased emoluments of employment. (R. 125, 184, 186-189).

The company also produced evidence of the fact that prior to the effective date of the contract in suit that it had maintained a practice of hiring (Whites) into line one on a different basis from hiring (Negroes) into line two (R. 376-401). That during such time no Negro would have been hired into line one and no whites into line two (R. 410-413).

The District Court denied all relief prayed for by petitioners and the Circuit Court of Appeals affirmed.

VI.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

1. The Court below has decided a federal question in a way which is in conflict with a decision of another court of appeals on the same matter. In the Court below the opinion states that it is "impossible" to place Negro incumbents on an absolutely equal footing with White incumbents, though the union and the company recognize that in the past Negro employees had been treated unfairly. The Court recognized also that Negro incumbents are at a disadvantage as compared with White incumbents in line one. The Court dismisses this, however, as a product of the past and that Petitioners can now do nothing about such. This is all done, the Court below says, in the interest of fairness and efficiency.

This language and consequent holding of the Court below is in direct conflict with the decision of the Circuit Court of Appeals, Fourth Circuit, in *Rolax v. Atlantic Coast Line R. Co.*, 186 F. 2d 473. The Court there says:

> " . . . It is idle to attempt to justify such discriminations on grounds of operating efficiency. It is proper of course for the Defendant railroad to adopt such rules regarding the service of firemen as are necessary to provide experience for the training of engineers . . .; but there is no reason why this may not be done *without substantial interference with* seniority rights. . . .".

This could very easily read, as applicable to the case at bar, that it would be proper for the Defendant, Sheffield

to adopt such rules regarding service of incumbents in line two as are necessary to provide experience for the training to move into line one, but that it may not be accomplished by substantial interference with seniority rights. The fact that seniority rights are interfered with in the instant case is not questioned. The fact of qualifying Negro employees to work in line one is one matter, but it has not been established that this can only be done by promoting into the bottom, thus in effect losing all accrued seniority and becoming the same as the white employee who has for the first time presented himself to the plant for work on that day.

It is to be remembered also that both these cases involve the question of whether a contract may incorporate within it the old discriminatory status of Negro employees. In the Rolax Case, Supra, the court said that discrimination against Negroes cannot be sustained merely because it is based on promotability, which is itself, in turn, based on race. The court below, in conflict with this very sound principle last mentioned in the Rolax case has held that discrimination against Negroes will be sustained merely based on the status the Negro held in line two, which is (line two) itself based on race. The reason why Petitioners are in line two is because of their race. The status that they held prior to the agreement of May 31, 1956, inheres in and is an integral and inseparable part of the contract in suit. The contract attempts to make no changes in that status or condition.

2. The court below has decided a federal question in a way in conflict with the applicable decisions of this court. The United States Supreme Court in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 89 L. Ed. 173, and

Tunstall v. Brotherhood of Railroad Trainmen, 323 U.S. 21, 65 S. Ct. 235, 89 L. Ed. 187, has held that the interests of the minority may not be sacrificed in favor of a majority which selected the bargaining agent. That the union which acts must act for all employees in negotiating collective agreements. Contrary to the principles the Court below has determined that a union may negotiate a contract which favors the majority and discriminates against the minority solely on account of race or color. The Court has determined, contrary to the holdings in the above cited cases, that white employees in their employment status must be protected whereas the employment status of the Negro employee may be adjusted only if it does not interfere with the employment status of white employees. This conflict should be resolved as it is of importance in the administration of the National Labor Relations Act.

Further conflict is seen between the holding below and language of this Court in *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 70 S. Ct. 15, 338 U.S. 232, 94 L. Ed. 22. This language from the Graham Case is as follows:

> "The effect of the agreements is to deprive them, solely because of their race, of rights and job assignments to which their seniority would entitle them."

In the case at bar the Court counted as naught the fact that the contract in suit means a loss of seniority to petitioners if they desire to promote into line one.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERSON L. KING
810 Prairie Avenue
Houston 2, Texas
Attorney for Appellants

APPENDIX A

28 U.S.C. 1254. COURTS OF APPEALS—CERTIORARI—APPEAL—CERTIFIED QUESTIONS.—Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. 1331. FEDERAL QUESTION—AMOUNT IN CONTROVERSY.—The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

§ 159. REPRESENTATIVES AND ELECTIONS—EXCLUSIVE REPRESENTATIVES; EMPLOYEES' ADJUSTMENT OF GRIEVANCES DIRECTLY WITH EMPLOYER.

(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17,290

BENNIE L. WHITFIELD, ET AL.,
Appellant,

versus

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 2708, ET AL.,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(January 30, 1959.)

Before HUTCHESON, Chief Judge, and RIVES and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: Five negro members of an integrated union assert that their union, under the guise of equalizing job opportunities at their employer's plant, negotiated a collective bargaining agreement that subtly but effectively discriminates against negro employees.

Plaintiffs-appellants work at the Houston steel plant of the Sheffield Division of Armco Steel Corporation. They are members of Local 2708, United Steelworkers of America, AFL-CIO, the certified exclusive bargaining agent for production and maintenance workers at the plant. The plaintiffs brought a class action against the Union and the Company attacking the validity of a collective bargaining agreement dated May 31, 1956, and seeking an injunction, a declaratory judgment, and damages. The case was tried to the court without a jury. After a lengthy trial and after findings and an opinion that reflects careful consideration of all the facts, the able district judge held that the contract was fair and free from racial discrimination. We affirm.

The complaint is based on the principle that a certified bargaining agent is under a duty to represent all employees fairly. *Steele v. Louisville & Nashville R.R. Co.*, 1944, 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173.[1] The Union and Sheffield do not take issue with the theory on which the case is brought. Their position is that the contract is fair and nondiscriminatory. In the Steele case the Supreme Court stated:

> "[The duty imposed on the bargaining representative] does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects upon some members of the craft represented. Variations in the terms of the contract based

[1] See also Hughes Tool Company v. NLRB, 5 Cir., 1945, 147 F. 2d 169; Tunstall v. Railroad Terminal, 1944, 323 U.S. 21, 65 S. Ct. 235, 89 L.Ed. 187; Huffman v. Ford Motor Co., 1953, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048; Syres v. Oilworkers International Union, Local No. 23 et al., 1955, 350 U.S. 892, 76 S. Ct. 152, 100 L.Ed. 785.

> on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representative of a craft, all of whose members are not identical in their interest or merit."

Thus, the provisions of the collective bargaining agreement must be *relevant* to the conditions of the particular industry and company to which they are to be applied. An agreement will be judicially condemned only in the case of "discriminations not based on such relevant differences. [D]iscriminations based on race alone are obviously irrelevant and invidious."

The question before the Court is whether the May 31 contract is fair, not only to the five negro plaintiffs, but to all Sheffield employees. If there are distinctions between the treatment of negro employees and the treatment of white employees, do such distinctions have their basis in relevant and reasonable differences or are the distinctions invidious discriminations based on race? What is fair is a moral decision resting on the conscience of the Court. To reach a just decision, it is necessary to examine and weigh the facts that produced the May 31 contract.

Background

The steel mill started operations in 1942. Since that time the Union has been the exclusive bargaining agent for production and maintenance workers. Almost without exception, all negroes employed at the mill belong

to the Union. This membership is voluntary, since Texas laws prohibit union shops. Of approximately 3000 employees in the bargaining unit,[2] 1700 are white and 1300 are negro employees. The Union has always been integrated. Negro members hold office in the Union, particularly the key office of Plant Grievance Chairman, and have always participated actively and responsibly in all features of the collective bargaining process.

When the Company commenced steelmaking in 1942 it employed white persons for skilled jobs and negroes for unskilled jobs, in accordance with local custom but chiefly because the only available skilled workers were white. From 1942 through 1946, by government regulation, the Company hired employees only through the United States Employment Service.

Collective bargaining contracts between the Union and the Company are master contracts covering the operations of steel plants throughout the country. These contracts, which are common in the steel industry, provided that at each local plant seniority units, lines of progression, would be established within a department.

For purposes of seniority, the Houston plant, like other steel mills in the country, is divided into departments. In accordance with the master contract, each department is divided into two lines of progression, each line constituting a seniority unit. Each line of progression encompasses a distinct operation and is composed of a series of interrelated jobs. The jobs start with the easiest in terms of skill, experience, and potential ability and progress step by step to the top job in the line. The knowledge acquired in a preceding job is necessary for the

efficient handling of the next job in the progression. Throughout the years, the skilled jobs within a department were grouped together in logical sequence and called the Number 1 Line of Progression. The unskilled jobs were also logically grouped together and called the Number 2 Line of Progression. Until the 1956 contract, the Number 1 lines were staffed by white employees and the Number 2 lines by negro employees.

Before the 1956 Agreement, those who applied for job in a Number 1 line were closely screened. Even after Sheffield was satisfied that an applicant possessed the qualities needed to progress in the line, he was subjected to a probationary period of two hundred and sixty hours. Any employee who failed to meet with the Company's approval could be discharged at the will of the Company during that period.

As to the Number 2 lines, from 1949 to 1956 all negroes started in the labor pool, or labor department. From the labor pool they bid into the starting jobs in the Number 2 lines. When laid off, a negro employee went back to the labor pool instead of losing a job altogether. Only negroes were hired into the labor pool.

In November, 1954, the first complaints of racial discrimination were made. Some negro employees were dissatisfied with the fact that they could not bid on jobs in the Number 1 lines of progression. As a result of the grievances, negotiations were commenced immediately

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2 The district court found:
"Accordingly, no employee of any race has been allowed to bid into any Line of Progression at any point above the bottom job, and no employee of any race has been allowed to be promoted out of line of his seniority in that particular Line of Progression."

between the Union and Sheffield. Negotiations were conducted between Company representatives and a Joint Seniority Committee composed of two negro and two white members of the Union. One of the two negro representatives was the Plant Grievance Chairman. In negotiations that lasted for almost a year the Union and Company representatives explored extensively a sound and fair basis for permitting negro employees to enter Number 1 lines of progression. The result of the negotiations was the agreement of May 31, 1956.[3]

The May 31, 1956 Agreement

The agreement made substantial changes in the Company's employment practices. Each bottom job in a Number 1 line was changed from a starting job, subject to the Company's uncontrolled screening, to a bid job. In doing this the Company had to give up its right of original selection. Under the agreement, no pool of white employees can be maintained to fill vacancies in a Number 1 line. Employees in Number 2 lines, negroes, are given preferential rights to fill vacancies in Number 1 lines. Any vacancy in a Number 1 line must now be filled by offering the job first to the bid of an employee in a Number 2 line in the same department, provided the employee first passes a qualifying test. If there is no employee in a Number 2 line in the same department who has passed the qualifying test, then a man in the labor pool who has passed the test may bid for the job. Both

[3] The two negro members of the Union Committee opposed the agreement. At the ratification meetings, the Union membership as a whole ratified the agreement 1412 to 202. Some 900 negroes attended the meetings but most of them declined to vote yes or no. Those negroes who voted cast approximately 200 to 14 against.

whites and negroes now must start in the labor pool. The Company relinquished all screening rights and terminated the 260 hour probationary period. A qualification test takes the place of rigid screening.[4] Once an employee passes the test, he is subject to no more investigation or screening. If he bids from a Number 2 line to a Number 1 line, he is entitled to fill the vacancy, if he has passed the test. The test is given to all employees who enter starting jobs in a Number 1 line, whether they are white or negro. Thus, under the agreement, openings in start-

[4] The district court found:
"During the negotiations for the May 31st, 1956, Agreement the Union bargained for and obtained substantial concessions from the Company concerning the uniformity and fairness of the Company test, and provided adequate machinery to check the examination results, thereby assuring all employees equal and fair treatment.
"The examinations accepted by the Company and administered to the employees are tests in wide commercial usage, and are scientifically designed to reveal the potentiality of the employee to promote to the highest skilled jobs in the plant. The examinations are a fair and reasonable substitution of the Company's right to an original selection. No question was raised at the trial in regard to the fairness with which the tests were administered. The record reveals that approximately 90 negro employees have passed the examinations and approximately 45 have moved into the bottom jobs of a No. 1 Line of Progression. The other 45 constitute a reservoir of qualified employees to move into the No. 1 Line of Progression as and when the bottom jobs open. This number has qualified themselves in spite of the fact that most of the negro employees in the plant have declined the invitation to take the examination. Several negro witnesses at the trial testified that they declined to take the examination as a matter of principle or for personal reasons, and there is a substantial evidence in the record from which the court concludes that there has been voluntary refusal to take the examination on the part of most of the negro employees, apparently in reliance upon this litigation as a means by which such requirement will be dispensed with."

ing jobs in a Number 2 line are filled from the labor pool. Openings in starting jobs in a Number 1 line are filled first from the Number 2 line in the same department, then from the labor pool if there are no qualified Number 2 line employees. If there is racial discrimination under the new contract, it is discrimination in favor of negroes.

The appellants complain that the agreement preserves the old inequalities. (1) They object to the qualification test for Number 1 lines. The effect is to require all negro applicants to take the test since on May 31, 1956, all employed negroes were in the Number 2 lines. (2) They object to the fact that one who bids into a Number 1 line from a Number 2 line must start at the bottom job. This will mean a wage cut in a case where the negro is up the ladder in a Number 2 line.

The Requirement of a Qualification Test

The appellants complain that they are discriminated against because the incumbents in a Number 1 line are not required to take the test to remain within the line or to be promoted. The incumbents, however, have already been screened and then subjected to two hundred and sixty hours of probation in which they had to prove their merit or be discharged. The tests seems to be a reasonable substitute for these requirements which the Company relinquished in the May 31 contract. Excluding incumbents from the test is based not on race but on their having already successfully passed screening and probation, at least equal to the tests. It is true that because negro employees in the past were only in Number 2 lines such negroes are treated differently from white

incumbents. But fairness is not achieved by treating the white incumbents unfairly. Efficiency is not achieved by giving negro applicants for Number 1 lines job advantages unrelated to their qualifications. It seems to us that the Company and the Union went about as far as they could go in giving negroes a preference in filling Number 1 line vacancies, consistent with being fair to incumbents and consistent with efficient management.

The district court held that the test requirement is the "minimum assurance" the Company could have of efficient operations, and that it was not a discriminatory requirement. We agree.

The Requirement That An Employee Enter A Number 1 Line At The Bottom Or Starting Job

The May 31 agreement eliminated racially separate lines of progression and opened all lines to all races. The Number 1 lines, however, remain a group of interrelated skilled jobs within a department. Jobs in a Number 1 line do not overlap jobs in a Number 2 line. Thus, an employee must start at the bottom in order to work his way up the Number 1 line. Such a system was conceived out of business necessity, not out of racial discrimination. An employee without the proper training and with no proof of potential ability to rise higher, cannot expect to start in the middle of the ladder, regardless of plant seniority. It would be unfair to the skilled, experienced, and deserving employee to give a top or middle job to an unqualified employee. It would also destroy the whole system of lines of progression, to the detriment of efficient management and to the disadvantage of negro as well as white employees having a stake in orderly promotion.

If a negro in a top job in a Number 2 lines wishes to enter a Number 1 line, he must start at the bottom. A lower salary to him, however, is not discrimination on the ground of race; the pay depends on the job and is the same for whites and negroes. He takes his chances on promotion and higher pay later in Number 1 line jobs. Certainly he is not entitled to receive more than others in the same job having the same qualifications. Finally, even if a negro were dissuaded from bidding into a Number 1 line because it would mean a pay cut, the vacancy would then be open to another negro.

In *Steele v. Louisville & Nashville R.R. Co.*, 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, union discrimination was obvious. The complainant proved that the union was trying to eliminate negroes from service as firemen under the Railway Labor Act. White employees of inferior competence had replaced the negro employees, although they were both equal in seniority. Only a white person could be assigned to a new job. Each seniority district was allowed only a small percentage of negroes. The record in that case bore out an "ugly example of economic cruelty". We have the exact opposite situation before us. The May 31 agreement makes available to the negro employees at Sheffield new jobs, higher pay, and it equalizes job opportunities for starting jobs after May 31, 1956. Whatever dissatisfaction the agreement brings to the appellants, as Line Number 2 incumbents, it cannot be blamed on racial discrimination in the existing agreement.

Although the Steele case specifically involved the Railway Labor Act, its principles apply with equal vigor to cases arising under the National Labor Relations Act.

Syres v. Oil Workers International Union, 1955, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785, reversing, 5 Cir., 1955, 223 F. 2d 739; *Ford Motor Co. v. Huffman*, 1953, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048. A union has a wide range of discretion under the Act, as long as it acts in good faith in the exercise of its discretion. In the Ford Motor case the question was whether the union, in a collective bargaining agreement with Ford, discriminated against veterans because of the system of determining seniority rights established in the agreement. The Supreme Court held that although the seniority rights of some veterans would be prejudiced, the union did not exceed its authority under the Act. The Court made the following observation:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. *The complete satisfaction of all who are represented is hardly to be expected.* A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

We think that Sheffield and the Union have acted well within the standards discussed in the Steele, Syres and Ford Motor cases.

The problem before us is not unique. It is bound to come up every time a large company substitutes a program of equal job opportunities for previous discriminatory practices. In such case it is impossible to place negro

incumbents holding certain jobs, especially unskilled jobs, on an absolutely equal footing with white incumbents in skilled jobs. In this situation time and tolerance, patience and forbearance, compromise and accommodation are needed in solving a problem rooted deeply in custom.

We attach particular importance to the good faith of the parties in working toward a fair solution. It seems to us that the Union and the Company, with candor and honesty, acknowledged that in the past negroes were treated unfairly in not having an opportunity to qualify for skilled jobs. They balanced the interests of negroes starting Line 1 jobs against the interests of employees who have worked previously in Line 1 jobs, in the light of fairness and efficient operation. After many months of negotiations, and having in mind their duty to all the employees and the need for proper management, they came up with the May 31 agreement, an honest attempt to solve a difficult problem. Courts, when called upon to eye such agreements, should not be quick to "substitute their judgment for that of the bargaining agency on the reasonableness of the modifications". *Pellicer v. Brotherhood of Railway and Steamship Clerks*, 5 Cir., 1954, 217 F. 2d 205. The Union and the Company made a fresh start for the future. We might not agree with every provision, but they have a contract that *from now on* is free from any discrimination based on race. Angels could do no more.

It is undeniable that negroes in Line Number 2, ambitious to advance themselves to skilled jobs, are at a disadvantage compared with white incumbents in Line Number 1. This is a product of the past. We cannot turn back the clock. Unfair treatment to their detriment in

the past gives the plaintiffs no claim now to be paid back by unfair treatment in their favor. We have to decide this case on the contract before us and its fairness to all.

Considering the contract from the standpoint of all the employees and recognizing the necessity for reasonable standards of operating efficiency, we find that there is no evidence of unfairness or discrimination on the ground of race.

The judgment is

AFFIRMED.

APPENDIX C

JUDGMENT.

Extract from the Minutes of January 30, 1959.

BENNIE L. WHITFIELD, ET AL.,

No. 17290.

versus

UNITED STEELWORKERS OF AMERICA, LOCAL No. 2708, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Bennie L. Whitfield, and others, and the surety on the cost bond herein, United States Fidelity and Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

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JAMES R. BROWNING, Clerk

No. 874

OCTOBER TERM, 1958

IN THE

Supreme Court of the United States

BENNIE L. WHITFIELD, ET AL., *Petitioners*

VERSUS

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 2708, ET AL., *Respondents*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals Fifth Circuit

BUTLER, BINION, RICE & COOK
GEORGE RICE
JAMES DENNIS SMULLEN
3200 Gulf Building
Houston 2, Texas
Attorneys for Respondents, Armco Steel Corporation and Sheffield Steel Corporation

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals Fifth Circuit

Statement

Respondents ARMCO STEEL CORPORATION and SHEFFIELD STEEL CORPORATION respectfully submit that Petitioners' Statement is not "a concise statement of the case containing the facts material to the consideration of the questions presented." For the most part, the

Statement is not factual at all. It is mainly (i) a recital of the allegations in Petitioners' Complaint, (ii) a recounting of what the "evidence tended to show", (iii) matters which Petitioners "argued", and (iv) matters about which Petitioners "objected."

The decision in this case rests upon 54 Findings of Fact which are embodied in the Trial Court's Opinion (156 F.Supp. 430) and appear in the Record at pp. 668-690. Petitioners' complaint is that the Agreement under attack requires that any one who enters a skilled Line of Progression enter at the bottom. The Trial Court found that (i) this requirement has always applied, (ii) it applies whether the man who seeks to enter is White or Negro, (iii) the training, experience and skill which a man obtains in the bottom job is a prudent and good faith prerequisite to his advancing to the next higher job in the Line, and (iv) the requirement that a man fill each job in order to qualify for the next higher job is motivated by good faith and sound judgment and is not motivated by bad faith or discrimination of any sort (R. 677-683).

These Fact Findings are completely supported by the evidence.

The decision of the Court of Appeals was likewise based upon the Fact Findings of the District Court and no Finding of Fact was disturbed.

Certain implications of Petitioners' Statement are also contrary to the following Fact Findings:

> "13. Continuously during the period from February 1943, to date, negro employees in responsible positions and offices in the Union have participated in the negotiation of the bargaining contracts, progression charts

grievances and similar proceedings and have joined in the execution of the contracts and writings entered into between the Company and the Union.

"14. Prior to November, 1954, the Negroes affirmatively approved and agreed to the promotion and progression practices and other practices in effect in connection with the filling of the jobs in the bargaining unit at the Sheffield Plant. During all of this period, the Negroes signified complete agreement to all such practices and did not object, protest or evidence any dissatisfaction."

It was incumbent upon Petitioners, in order to preserve any challenge which they had to the Trial Court's Fact Findings, to show the Court of Appeals the error of these Findings. Although certain Fact Findings were assigned as error by Petitioners in the Court of Appeals, Petitioners did not brief these assignments (See Appellants' Brief in Court of Appeals).

Argument

Petitioners assign two reasons for the grant of the Writ:

1. The conflict of the Opinion of the Court of Appeals with that in *Rolax v. Atlantic Coast R. Co.*, 186 F.2d 473;
2. The conflict of the Opinion of the Court of Appeals with the holdings of this Court in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 89 L.Ed. 173; *Tunstall v. Brotherhood of Railroad Trainmen*, 323 U.S. 21, 65 S.Ct. 235, 89 L.Ed. 187; and *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232, 70 S.Ct. 15, 94 L.Ed. 22.

Petitioners' asserted conflicts do not exist. The Court of Appeals decided the instant case under the rule of the *Steele* case, and cited that case in support of its holding.

The Court of Appeals relied upon and quoted from *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048, an even more recent decision of this Court.

Petitioners have no basis to contend that the lower Courts misconstrued or misapplied the now settled doctrine of the *Steele* case and the similar holdings of the other decisions cited. The Court of Appeals has not announced any new doctrine; it has not strained or tugged against the established doctrine of the *Steele* case; it has simply ruled that under the uncontroverted facts of this case, no taint of discrimination is present.

In reality, Petitioners seek to have this Court examine not legal principles but fact findings that are so uncontrovertibly established by the evidence that they did not even merit attack by Petitioners in their Brief to the Court of Appeals. In essence, the lower courts in the instant case have found from the evidence that honest, fair, prudent and sound business principles require that an employee, White or Negro, be required to start at the bottom and ascend the ladder of a skilled Line of Progression and that he not try to begin at the top or midway on the plea that a period of being present at a plant in a common labor or semi-skilled job is somehow a substitute for the essential training and experience of the skilled jobs in the lower range of the Line. Petitioners are, in effect, contending that a young man, White or Negro, should not have to start as a freshman, but if he is as old as a sophomore, he should be permitted to skip the freshman class on the

theory that time spent is somehow the equivalent of learning and acquired skill.

This case presents no arguable issue of race discrimination. Petitioners regrettably seek to envelop it in an invidious aura and thereby obscure the absence of any factual basis of complaint. To illustrate, Petitioners' phrasing of the "Questions Presented" is adroitly abstract. The generality of the Questions leaves unexpressed any specific, particular error in the decisions of the District Court and the Court of Appeals.

Conclusion

There being no valid ground for the grant of Writ of Certiorari, it should be denied.

Respectfully submitted,

GEORGE RIGE
JAMES DENNIS SMULLEN
Attorneys for Respondents,
Armco Steel Corporation and
Sheffield Steel Corporation

Certificate of Service

THIS IS TO CERTIFY that service of the within Brief has been made by mailing a copy thereof with first-class postage prepaid, addressed to each of the following counsel of record at the post office addresses shown:

Roberson L. King
810 Prairie Avenue
Houston 2, Texas
Counsel for Bennie L. Whitfield, et al., Petitioners

Chris Dixie
Scanlan Building
Houston 2, Texas
Counsel for Respondent United Steelworkers of America, Local No. 2708

James Dennis Smullen

JAMES DENNIS SMULLEN

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No. 874

October Term, 1958

IN THE

Supreme Court of the United States

BENNIE L. WHITFIELD, ET AL., *Petitioners*
v.
UNITED STEELWORKERS OF AMERICA, LOCAL 2708, ET AL.,
Respondents

BRIEF OF RESPONDENTS, Local 2708 and Claude Baldree, Its President, In Opposition To Petition For Writ of Certiorari To the United States Court of Appeals Fifth Circuit

DIXIE & SCHULMAN
CHRIS DIXIE
505 Scanlan Building
Houston 2, Texas
Attorneys for Respondents

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

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BRIEF OF RESPONDENTS, Local 2708 and Claude Baldree, Its President, In Opposition To Petition For Writ of Certiorari To the United States Court of Appeals Fifth Circuit

This reply in opposition to the grant of certiorari is filed on behalf of Local 2708, United Steelworkers of America, AFL-CIO, an unincorporated association, and Claude Baldree, president of the local union, two of the Respondents and Defendants below.

The other Respondent, Armco Steel Corporation, the employer, will file its own reply.

These Respondents accept Petitioners' Preliminary Statement, Statement of Jurisdictional Requisites, and Statement of Statutes involved.

QUESTIONS PRESENTED

We regret we cannot accept Petitioners' statements of the three questions. We think each of them tends to assume the matter in dispute and thus answers itself without disclosing the exact issue in the case.

The three questions stated in the petition are somewhat vague and general. Further, the discussion in the statement and in the supporting brief goes far beyond the matters which were actually litigated in the District Court and submitted to the Court of Appeals.

As reflected by Plaintiffs' Complaint (Tr. 4-16), by the District Court's Findings of Fact and Conclusions of Law (Tr. 665-693 at page 672) and by the opinion of the Court of Appeals (Petition, page 17), two specific complaints were presented by Petitioners to the courts below. The first of these concerned the matter of examinations. The opinion of the Court of Appeals makes full and fair answer to this complaint. Apparently, this question is now abandoned by Petitioners for it is not mentioned in the Petition for Certiorari.

The second specific complaint raised below is the allegation that Negro employees must suffer a "penalty" as the price of promotion, thereby being subjected to an unlawful or discriminatory discouragement. This matter is mentioned in the second stated question presented by Petitioners.

Therefore, the only question truly preserved and now raised for consideration of the Supreme Court is as follows:

> In some cases Negro applicants may receive reduced pay upon entering a Number 1 line of progression. Does this fact render the contract discriminatory or unlawful under the circumstances of this case?

We believe the foregoing is the precise matter which is now properly brought forward. However, these Respondents say that the entire transaction which is the background of this specific complaint was a very proper and responsible revision of employment practices by an employer and a union to meet allegations of racial discrimination and to make corrections by fully complying with the letter and spirit of the law. Therefore, in replying here, we think it proper to touch upon all of the criticisms interspersed throughout the petition.

STATEMENT OF THE CASE

The opinion of the Court of Appeals is in the main an accurate summary of the things done by the company and the union in the May 31, 1956 agreement. In short, from the beginning in 1942 until shortly before the agreement, all Number 1 lines were occupied by white employees and all Number 2 lines by Negroes. The Number 1 lines were manned in each department by means of hiring new employees into the bottom jobs. All hiring has always been done by the company unilaterally.

Since 1949 Negro employees have been hired by the company into a Labor Pool; thence, they have promoted upward into the various Number 2 lines of progression.

The May 31, 1956 agreement abolished all distinctions in starting jobs and provided that white and Negro employees alike would be employed into the same job in the Labor Pool. From there all employees promote by seniority into the Number 2 lines of progression. Furthermore, they promote by seniority into the Number 1 lines of progression if they exhibit the identical qualifications required by the company to man its skilled jobs.

Thus, the former right of the company to unilaterally select new employees to enter into its Number 1 lines of progression has been contracted away. The bottom job in each Number 1 line of progression is now a "bid job" subject first to the preferential bid of an employee in the Number 2 line of progression in the same department. If the job is not bid in by an employee in the Number 2 line of progression, then it is subjected to the preferential bid of an employee in the Labor Pool. Since all employees in the Number 2 lines and in the Labor Pool were Negroes as of the date of the agreement, all starting jobs in all Number 1 lines of progression have been made preferentially available to the Negro incumbents in the plant. Evidently, this is the fact that caused the Court of Appeals to comment: "If there is racial discrimination under the new contract, it is discrimination in favor of Negroes." (Petition, page 17)

The case came on for trial in September, 1957, more than a year after the effective date of the agreement. The trial court's judgment for defendant was not entered until December 10, 1957 (Tr. 692-693). As of the date of trial, forty-five Negro employees had moved into the skilled jobs, and an additional forty-five had qualified themselves and thus constituted a reservoir of qualified employees to move into the Number 1 lines (Tr. 687).

Not one iota of evidence was offered to show that the possible step-down ("penalty") in pay had in fact occurred in any case, or was excessive, or had in fact operated in a discriminatory manner.

The opinion of the Court of Appeals contains a sufficient answer to this complaint in two paragraphs (Petition, pages 18-19). The requirement that an employee enter a Number 1 line at the bottom job was found by both courts below upon adequate evidence to be a requirement arising out of business necessity, not out of racial discrimination. The Number 1 lines are nothing more than the systematic arrangement of a group of logically interrelated skilled jobs within a department. Upward progression from the simplest job at the bottom to the most demanding at the top is a necessity to provide systematic employee training and development.

Furthermore, as the court below noted, the possibility that an employee in a Number 2 line must suffer some reduction in pay results from the pay schedule attached to particular jobs and is the same for both whites and Negroes. Furthermore, if the suspicious mind would imagine that the purpose of the contract was to dissuade the highest ranking occupant of a Number 2 line from taking a cut, the Court properly noted that the bid would then revert to another Negro lower in the Number 2 line, and then to still another Negro in the Labor Pool, either of whom might well receive an *increase* in taking the step into the Number 1 line.

Not set out in the Court of Appeals' opinion is the background reason for this possible step-down in some cases.

This record shows that the wage rates of various jobs are expressed in the steel industry in terms of "points". Thus, there is a four-point job, or a five-point job, or a twelve-point job (Tr. 542). The difference between each point is 6½¢ per hour (Tr. 542). The wage for a two-point job is $1.89 per hour (Tr. 211).

In past years, the parties here have contracted to adopt the Steelworkers' famed "Inequity Program". In the evaluation of the proper pay for the jobs in this steel mill, twelve factors have been contractually adopted by the company and the union (Tr. 542). These are, (1) pre-employment training, (2) mental effort, (3) mental skill, (4) responsibility for materials, (5) responsibility for operations, (6) responsibility for the safety of others, (7) physical effort, (8) surroundings of the work, (9) hazard of the work, and three others which do not appear in the record (Tr. 542-543).

Accordingly, a given nine-point job might be so rated because it involves excessive risks, or hazard to the man, excessive heat or temperature, or a large amount of physical effort (Tr. 543). Thus, it is possible that a hypothetical nine-point *unskilled* job may be rated this high (for wage purposes) because of its physical demands without being a good index of a man's capacity to develop in skilled lines of progression (Tr. 543). Obviously, the bottom job of a Number 1 line may be rated lower than some jobs in the Number 2 line of progression because the latter may be heavily weighted in the physical and non-skilled factors.

The wage rates so attached to these various factors of human values are not discriminatory. To the contrary, they were highly appropriate bargainable matters about which company and union have contracted in the past. Indeed,

this kind of wage structure reflects a very proper regard by the union for the adequate compensation of the unskilled worker, who in past years has been the Negro employee. Contrary to some sordid episode of non-representation recorded by others in the law books, this union has attached real weight to the physical demands upon the unskilled worker, as well as his surrounding conditions of risk and discomfort which are commonplace in the steel industry, thereby causing some unskilled jobs to carry a higher rate of pay than some skilled jobs. These commendable efforts by the union have now come back to plague it in the form of an argument that the occasional step-down in pay is "discriminatory" on grounds of race.

REASONS FOR DENYING THE WRIT

1. We respectfully suggest to the Supreme Court that the specific complaint of "penalty" upon bidding into a Number 1 job is insubstantial. The contrary findings below are based upon solid evidence and good sense.

2. As to the broader approach, full recognition of the obligation to accord equal and fair representation has been given by both courts below. Every complaint or criticism submitted by Petitioners below was carefully examined. The May 31, 1956 agreement was scrutinized in great detail responsively to the said complaints. The findings of fact below are unchallenged and fully based upon credible evidence. No quarter has been given to any weakening of the obligation of fidelity to all and none was requested.

3. As to the future, the May 31, 1956 agreement is admittedly unchallengable. With all new employment concentrated into one starting job, and all promotions into all departments regulated by one set of rules, the program

is fixed by which Labor Pool, Number 2 lines, and Number 1 lines will, in due course, be indiscriminately manned by both races with every man progressing without reference to race. As between two young high school graduates, white and negro, respectively, who hire out at this plant *after* the May 31, 1956 agreement, there can be no possible difference in their careers traceable to race. Not even a courtesy deference to the old way has been left.

4. As to the incumbents, of course, the solution was not so easy. Here, Petitioners seek to exploit the candid recognition by the Court of Appeals that some holdover disadvantage may remain. "We cannot turn back the clock." (Petition, page 21.) However, the union did cause *every* opening in every starting job of a Number 1 line to be subjected first to the bids of the incumbent Negro employees. This condition continues under the contract until all eligibles (present and future) have been exhausted. Any employee who declines to take the uniform test, or who fails, has the continuing right to re-take the test every six months until he does pass. Upon passing, he becomes a preferred bidder. (Tr. 31)

5. It is true that before the May 31, 1956 agreement, whites were the sole occupants of Number 1 lines, and Negroes were the sole occupants of Number 2 lines. The Court of Appeals assumed from this that: "In the past, Negroes were treated unfairly in not having an opportunity to qualify for skilled jobs." (Petition, page 21) Perhaps the court was granting *arguendo* that the former division of the jobs was unfair.

However, this record shows conclusively that the former condition existed by consent and procurement of the

Negro employees and by Negro representatives of this always thoroughly integrated local union. Negro employees and members have held key union offices and have participated in all phases of the bargaining processes, including the designing of the lines of progression and the channels of promotion. (Tr. 671; 674; 675). A division of the jobs which reserved to the Negro employees a percentage of the jobs which exceeded several times over their population ratio in the community was understandably acceptable to them and desirable in the past. When change was for the first time demanded by them (Tr. 675) it was made, as it should have been (Tr. 676; 137).

The former division of the jobs, however, is a different matter from the establishment and maintenance of the lines of progression. Upon uncontradicted and substantial evidence the District Court found that all aspects of the lines of progression, their arrangement, promotion within them, and the requirement of progression from the bottom to the top are actuated by good faith and prudent business management (Tr. 675; esp. 685-686). The company has always insisted upon this logical arrangement of the related jobs (Tr. 675; 677) and the job-to-job promotion (Tr. 677-678). The District Court further found upon sufficient evidence that the system adopted was based upon relevant factors and that a disturbance of the system would deprive the company of the basic condition to its agreement to any system of promotion by seniority (Tr. 679). Even Petitioners' counsel at the trial below were careful not to attack the lines of progression as such:

> "We have not contended that lines 1 and lines 2 should be eliminated. We believe what we call discriminatory practices should be eliminated." (Tr. 511)

Finding of Fact No. 38 (Tr. 685-686), unchallenged below, is as follows:

> "38. The Lines of Progression have been set up in good faith, in accordance with sound and prudent business management, and are appropriate for the efficient operation of a steel mill. They were not motivated by bad faith or racial discrimination. It is true that prior to the May 31st Agreement only white employees staffed the No. 1 Lines and negro employees staffed the No. 2 Lines. The No. 1 Lines involved the performance of skilled work in the production and maintenance departments of the Company and the No. 2 Lines involved the performance either of unskilled work or work requiring a minimum degree of skill. Since the May 31st Agreement there is no racial distinction or discrimination in the No. 2 and No. 1 Lines but all such Lines are now being staffed indiscriminately with both white and negro employees. The fact that prior to May 31st Agreement No. 2 Lines were staffed by Negroes does not present any basis for eliminating No. 2 Lines since the true basis for the existence of the No. 2 Lines is to provide a proper, prudent and sound sub-departmentalization of the operations of the steel plant regardless of whether the employees in such Line consist wholly of Negroes, wholly of whites or both races indiscriminately."

6. Among the commonplace bargaining issues in America today are the demands of industry for promotion systems which provide orderly, thorough and reliable development of employee skills and experience. Pure seniority promotion unrelated to the skills needed for the job can seldom be bargained for—even if we lightly assume that it is desirable. It was not discriminatory for the May 31, 1956 contract to leave in effect the same path of promotion which

had always been, and would still be, utilized for white employees.

These matters would seem to go without saying. However, Petitioners describe this feature of the contract as an impairment of the Negroes' seniority. Obviously, this is not so. Furthermore, both courts below found complete good faith on the part of this Respondent union. The history of the union supports the findings (Tr. 690; Petition, page 21).

7. There is no conflict with the decision of the Fourth Circuit in *Rolax v. Atlantic Coastline Ry. Co.*, 186 F. 2d 473. In that case, it is revealed that Negro firemen, because they were Negroes, were never promoted to engineers in the railroad industry as a matter of custom and practice. The union in that case caused the railroad to adopt a "forced promotion rule" under the terms of which Negroes were required to promote to engineers. If they failed to qualify as engineers, they lost all employment. Thus, the union had designed a rule which on its surface applied with equal and majestic impartiality to the employees of both races, but which in practice would eliminate the non-promotionable Negro firemen because they could not qualify to become engineers. This transparent ruse was stricken down by the Fourth Circuit as it properly should have been. But the court there pointed out that, of course, it is proper for the railroad to adopt rules regarding the service of firemen as are necessary to provide experience for the training of engineers and to enter into agreements with the union with regard thereto. The holding is simply that the need for proper rules may not be used as a pretext for bringing harm or disadvantage to the Negroes because of race.

In our case, the seniority of the Negro employees is fully protected and at the same time they are given equal opportunity to move upward. No pretext is involved and the record is devoid of any ugly tell-tale signs that something less will be done than the May 31 agreement promises or the Constitution requires.

8. While full fidelity to all races is rightly required by *Steele v. Louisville & N. R. Co.*, 322 U.S. 192, the actual integration of a complex plant like this one involves an interplay of "relevant" problems even after the invidious is expunged. It is the duty—and the right—of the bargainers to make the necessary changes in the first instance. "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Company v. Huffman*, 345 U.S. 330. Here the only "discretion" exercised by the bargaining agent was to accept the identical combination of training and seniority which had theretofore been found proper by company and union. It is hard to conceive how the union could do otherwise.

CONCLUSION

These Respondents realize that the discussion here has gone beyond the precise issue properly raised by the Petition for Certiorari. This has been made necessary by the fact that the petition, itself, does the same.

Since the trial occurred after the May 31, 1956 agreement had been in operation for more than a year, and since no irregularities or bad results in practices were claimed or proved, we think there is every support for the assertion that the judgments below were right.

The misgivings of the Petitioners asserted in the Court of Appeals and here have no merit. If there is a failure to give faithful and non-discriminatory performance under the May 31 agreement, the courthouse continues to be open.

These Respondents respectfully submit that the Petition for Writ of Certiorari to review the judgment of the Court of Appeals should be denied.

Respectfully submitted,

CHRIS DIXIE
503 Scanlan Building
Houston 2, Texas

By _____
Attorney for Respondents, Local 2708, United Steelworkers of America, AFL-CIO, and Claude Baldree

CERTIFICATE

Service on counsel for Petitioners and counsel for remaining Respondent has been duly made in person on May _____, 1959, which service has been properly certified to the Clerk of the Supreme Court.

_____